



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2003

Ms. Rebecca L. Payne
Assistant General Counsel
Texas Department of Human Services
P. O. Box 149030
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OR2003-6718

Dear Ms. Payne:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188402.

The Texas Department of Human Services (the "department") received a request for:

- a) any proposed letter or notice sent, or planned to be sent, to any group of Texas Medicaid recipients, informing them (i) that their community care hours of service will be reduced by a certain percentage, or (ii) of any other across-the-board cut in hours, services, or benefits;
- b) documents reflecting any decision to reduce community care hours of service, or to make any other across-the-board cut in services, to Texas Medicaid recipients as a result of funding, fiscal, or financial concerns, constraints, or pressures (including the decision itself, the reasons for the decision, the identities of those involved in the decision, and the nature of the decision-making process);
- c) documents reflecting, and information relied on in making, the decision by the [department] to propose new § 48.2925 in its Community Care for Aged and Disabled chapter, which allows for a 15% reduction in PAS hours for all but priority clients (including

every reason or basis for the decision, any analysis of the effects of the decision on those individuals subject to it, the identities of those involved in making the decision, and the nature of the decision-making process);

- d) documents reflecting how all of the money that Texas has received (or will receive) under Sec. 401(a) of the Job and Growth Tax Relief Reconciliation Act of 2003 will be spent or applied, including but not limited to the specific agency receiving such funds and the line item budget strategy, the identity of those persons involved in the decision, and the nature of the decision-making process;
- e) documents reflecting how much of the money (in dollars and in percent) that Texas has received (or will receive) under Sec. 401(a) of the Job and Growth Tax Relief Reconciliation Act of 2003 will be spent or applied to restore Medicaid provider reimbursement rates and Community Care hours (including the identity of those involved in the decision, and the nature of the decision-making process);
- f) documents reflecting how all of the money that Texas has received (or will receive) under Sec. 401(b) of the Job and Growth Tax Relief Reconciliation Act of 2003 will be spent or applied, including but not limited to the specific agency receiving such funds and the line item budget strategy, the identity of those persons involved in the decision, and the nature of the decision-making process;
- g) documents reflecting how much of the money (in dollars and in percent) that Texas has received (or will receive) under Sec. 401(b) of the Job and Growth Tax Relief Reconciliation Act of 2003 will be spent or applied to restore Medicaid provider reimbursement rates and Community Care hours (including the identity of those persons involved in the decision, and the nature of the decision-making process);
- h) documents reflecting the contents or formulation of any plan (by the Legislative Budget Board, the Governor, or otherwise) that outlines the transfers of State Fiscal Relief Federal Funds as described in Sec. 11.28, Article IX, General Appropriations Act, 2004-05 Biennium (including the plan itself, the identities of those involved in the planning, and the nature of the planning or decision-making process); and

- i) documents reflecting the use or transfer (both actual and planned) of state fiscal relief federal funds to agencies or institutions whose budgets would otherwise have been reduced pursuant to Sec. 11.15, Article IX, General Appropriations Act, 2004-05 Biennium, including but not limited to the specific agency receiving such funds and the line item budget strategy, the identity of those persons involved in the decision, and the nature of the decision-making process.

You state that the requestor subsequently clarified that this request “includes all drafts of proposed letters or notices discussed in category (a) and all drafts of proposed rule 45 T.A.C. § 48.2925 discussed in category (c).” *See* Gov’t Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You state that some responsive information is being released to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.106, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted representative sample documents.² We have also considered comments submitted by the requestor. *See* Gov’t Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

As a preliminary matter, we note that the comments submitted to this office by the requestor specifically reflect that the requestor is not seeking information that identifies individual clients of the department who are receiving community care services from the department. Accordingly, we find that any portion of the submitted information that would identify such a client is not responsive to this request and need not be released to the requestor.

You claim that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with sections 12.003

¹ We note that although the department did not claim that any portion of the remaining requested information was excepted from disclosure under section 552.101 within ten business days of the department’s receipt of the request, we will address the department’s claims under this exception to disclosure since such claims constitute compelling interests that are sufficient to overcome any existing presumption that the portions of the remaining requested information to which these claims pertain are now public. *See* Gov’t Code §§ 552.301, .302; *see also* Open Records Decision Nos. 150 at 2 (1977), 319 (1982).

² We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

and 21.012 of the Human Resources Code.³ Section 12.003 prohibits the disclosure of information concerning clients of a state plan for medical assistance, except for a purpose directly connected with the administration of the plan. *See* Hum. Res. Code §§ 12.003, 21.012; *see also* 42 U.S.C. § 1396a(a)(7); 42 C.F.R. § 431.301; Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 provides:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a). In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide safeguards restricting use or disclosure of information concerning applicants for or recipients of department's assistance programs to purposes directly connected with administration of programs); *see also* Open Records Decision No. 166 (1977).

You state that the portion of the remaining submitted information that you claim to be confidential under section 12.003 concerns identified individuals receiving community care services from the department. You also state that this information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties. Further, you state that the release of this information would not be for purposes directly connected with the administration of the department's assistance programs. Based on your representations and our review of this particular information, we find that the entirety of the information constitutes "any information concerning" persons applying for or receiving assistance. Accordingly, we conclude that the department must withhold the entirety of this particular

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

information pursuant to section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code.⁴

You also claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.107(1) of the Government Code. Section 552.107(1) protects information that is encompassed by the attorney-client privilege. When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *see id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *See id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

⁴ Because we base our ruling regarding this particular information on section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code, we need not address your remaining arguments with respect to this particular information.

Regarding the information that you claim to be protected under the attorney-client privilege, you state that “[a]ll drafts of the enclosed letters, notices, and rules and any revisions to such drafts that were suggested by program staff were forwarded to department legal counsel for their legal review, comment, possible revision, and approval.” You also state that some of these documents “were created or otherwise generated by and shared amongst department legal staff for their use in facilitating their drafting and legal review of proposed letters and administrative rules.” Based on your representations and our review of the information at issue, we agree that the information that you seek to withhold under section 552.107(1) reflects confidential communications exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the department may withhold the entirety of the information that it seeks to withhold under section 552.107(1) of the Government Code pursuant to that particular exception to disclosure.⁵

Finally, you claim that the remaining submitted information, or portions thereof, is excepted from disclosure pursuant to sections 552.106 and 552.111 of the Government Code. Section 552.106 excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation” and “[a]n internal bill analysis or working paper prepared by the governor’s office for the purpose of evaluating proposed legislation.” Gov’t Code § 552.106(a)-(b). Sections 552.106 and 552.111 are similar in that both of these exceptions to disclosure protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 3 (1987). However, section 552.106 applies specifically to the legislative process and, thus, is narrower than section 552.111. *See id.* The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and, therefore, it does not except purely factual information from disclosure. *See id.* at 2. Furthermore, section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See id.* at 1.

Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *see also* Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts only those internal

⁵ Because we base our ruling with regard to this particular information on section 552.107(1) of the Government Code, we need not address the department’s attorney work product or deliberative process privilege claims under section 552.111 of the Government Code for this particular information.

communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *See id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

We also have concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2. In addition, information created for a governmental body by an outside consultant acting in an official capacity on behalf of the governmental body is encompassed by section 552.111. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task within governmental body's authority), 462 at 14 (1987) (statutory predecessor applies to memoranda prepared by governmental body's consultants).

Regarding the information that you claim to be protected under sections 552.106 and 552.111, you indicate that the information includes communications relating to various options the department is or was considering in making various policy changes with regard to revising eligibility standards for department assistance to clients or reducing available amounts of services or other assistance for eligible clients. You state that the information includes "deliberative information on the effects of the various options, the benefits and drawbacks of those options, and other information reflecting the deliberative processes of the department concerning such proposed policy changes." Finally, you assert that some of this information "consists of staff response to legislative inquiries concerning proposed legislation affecting the department and/or its clients, staff analysis of the effect of those bills on the department and its programs, the various policy decisions that the department might

have to make as a result of reduced appropriations, discussions of the various options that the department might have to consider, and information regarding the effect of those various options that could impact such policy decisions and options.”

Having reviewed the remaining submitted information and considered your arguments, we conclude that the department has adequately demonstrated that some of this information is excepted from disclosure pursuant to section 552.106 and that the remaining information is excepted from disclosure pursuant to section 552.111 of the Government Code. We have marked this information for your convenience.

In summary, any portion of the submitted information that would identify a department client who is receiving community care services from the department is not responsive to this request and need not be released to the requestor. The department must withhold the remaining submitted information that it claims to be excepted from disclosure under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code pursuant to those provisions. The department may withhold the entirety of the information that it seeks to withhold under section 552.107(1) of the Government Code pursuant to that exception to disclosure. The department may withhold the information that we have marked pursuant to sections 552.106 and 552.111 of the Government Code. The department must release to the requestor the remaining submitted information for which it did not claim any exception to disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 188402

Enc. Marked documents

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